

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO. 821 OF 2003
IN
NDPS SPECIAL CASE NO.148/1999

THE UNION OF INDIA

..PETITIONER.

V/S.

1. MR. ABOUBACAR SOW &

2. STATE OF MAHARASHTRA

..RESPONDENTS.

MR. H.V. Mehta for Petitioner.

Mr. A.S. Sarpande for Respondent No.1.

Mr. D.P. Adsule, APP for Respondent No.2- State.

CORAM : A.S. AGUIAR, J.

DATED : 25.08.2004

PC:-

. Heard learned Advocate for the Petitioner and learned APP for the State. Rule. By consent, Rule returnable forthwith.

2. By this petition, the petitioner seeks

quashing of the order dated 13.03.2003 passed by the Special Judge, NDPS, Court, Special Case No. 148/1999. The order dated 13.03.2003 challenged herein has not been annexed to the petition. However, the original R & P was called for from which the order dated 13.03.2003 reads as follows :-

. "13.03.2003 -Coram: H.H.J.Shri S.B.Rathi.

Mr. C.T. George, SPP for Custom
-present.

Mr. Sarpande, adv. for accd.
present. Accd. produced from M.C.
Hd. Adv. for accd. on the point of
sentence. At this stage Ld.Adv. for
accd. brought to my notice that in
this case accd. has not been given
opportunity to lead defence evidence
as provided under sec. 233 of
Cr.P.C.

It appears that their aspect is over
looked before hrg. Argument in
details. In the circumstances in the
interest of Justice and to avoid the
technical defect of non compliance of
Sec. 233-I allowed the accd. to

lead defence evidence."

3. From the said order, it is seen that the learned trial court has permitted the accused to lead evidence on behalf of the defence at a stage when arguments were concluded and the trial court had made up its mind about the guilt of the accused and therefore, called upon the accused to address the court on the point of sentence. It was at this stage brought to the notice of the court that the accused was not given an opportunity to lead evidence in his defence. It is pointed out that at the conclusion of statement of the accused u/s. 313 of Cr.P.C., which was being recorded on 23.10.2002, the accused informed the court that he wanted to lead evidence in his defence and accordingly applied for adjournment and the matter was accordingly adjourned to 20.10.2002. However, the matter was not taken up on that day nor on adjourned date i.e. 13.11.2002 nor on the subsequent dates till 13th of March, 2003 when the court passed the said order, permitting the accused to lead evidence in his defence.

4. It is this order, which the petitioners are challenging on the ground that the court has already

pronounced the judgment of conviction in open court and therefore, the court could not have passed an order permitting the accused to lead evidence in his defence, which order is contrary to law and, therefore, illegal. From the said order dated 13.03.2003, it is seen that the learned trial Court had called upon the accused to address the court on the point of sentence and therefore, presumably, the court had made up its mind to convict the accused. However, no order of conviction was dictated as the learned Judge wanted had to first hear the accused on the question of sentence. It, therefore, cannot be said that the court had pronounced an order of conviction in open court.

5. In the circumstances, the learned trial Judge was obliged to permit the accused to lead evidence in his defence specially in view of the fact that the accused at the time of his 313 statement has clearly informed the court that he wanted to lead evidence in his defence. Thereafter, on several dates, the matter could not be taken up. The accused, therefore, had no opportunity to lead evidence in his defence and it was, thereafter, only on 13th March, 2003, when the trial court called upon the learned Advocate for the accused to address the court on the question of sentence, that the trial court was,

reminded of the request of the accused to permit the accused to lead evidence. It, therefore, cannot be said that the order of the trial court, permitting the accused to lead evidence is illegal and that such an order could not have been passed by the trial court. The trial court had not become functuous officio at the time of the passing of the impugned order dated 13.03.2003 and the trial court has rightly exercised its jurisdiction to permit the accused to examine his witness in his defence. Not allowing the accused to lead evidence in his defence would be depriving the accused of his legal right, which would have seriously prejudiced the case of the defence. In the circumsance, the validity of the order of the trial court is upheld. The accused is permitted to examine witnesses in his defence. The trial court will summon the witnesses on an application that may be made by the accused. The applicant will furnish the names and address of his proposed witnesses.

6. With the above order, the petition rejected and stands disposed of. Rule discharged. R & P be returned to the trial court immediately.

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